

No. 87-1271

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1987

International Organization of Masters, Mates & Pilots,
Pacific Maritime Region, A Labor Organization;
Kurt Petrich; Robert W. Seidman; *et al.*,
Petitioners,

v.

Eleanor Andrews, Commissioner of Administration
of the State of Alaska;
Richard J. Knapp, Commissioner of the Department
of Transportation and Public Facilities
of the State of Alaska;
Martin Nusbaum, Director of Administrative Support
of the Marine Highway System
of the State of Alaska;
John Does II-X, Officers of the State of Alaska,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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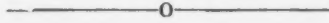
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RESPONDENTS' BRIEF IN OPPOSITION

The respondents Eleanor Andrews, Commissioner of Administration of the State of Alaska; Richard Knapp, Commissioner of the Department of Transportation and Public Facilities of the State of Alaska; Martin Nusbaum, Director of Administrative Support of the Division of the Marine Highway Systems of the State of Alaska; *et al.*, respectfully request that the Court deny the petition for

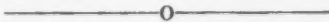
writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 831 F.2d 843 (1987) and is reproduced in Appendix A of the petition.



STATEMENT OF THE CASE

This case concerns an Alaska Statute, AS 23.40.210, that causes the wages of Alaska Marine Highway System employees to be tied to the cost of living of the employees' residences. The purpose of the statute is to equalize the purchasing power of those wages and remove a disincentive to residing inside the state.

The material facts in this case are not disputed. The facts are stipulated in the parties' "Statement of Facts not in Dispute" (April 26, 1983), which is reproduced in Appendix D to the petition.



REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners have challenged the constitutionality of Alaska Statute 23.40.210. The 1977 amendment to the statute requires that the salary of state employees account for the difference in the cost of living between employees residing inside and outside the state. Before the amendment, the only state employee collective bargaining agreements that did not contain cost of living differentials in their pay plans were those negotiated with the three

maritime unions, whose members are employed by the state on the Alaska Marine Highway System.¹

I. The Ninth Circuit decision will have narrow application.

The amendment was designed to remedy a problem unique to Alaska. After the Alaska Supreme Court found unconstitutional an Alaska statute that established a durational residence requirement for employment by the state, *Alaska v. Wylie*, 516 P.2d 142 (Alaska 1973), two of the maritime unions with workers on the state owned ferry system pressed for a contract that would allow their members to reside in Seattle and report to work there. Through collective bargaining, the unions did obtain the right for regular crew changes in Seattle, one of the ports of call of the ferry system.

Employees on the southeast run of the ferry work in pairs and the collective bargaining agreements provided that the senior member of the pair select the change of port for the pair. As a result Alaska resident state workers could be required to report to work in Seattle.

In addition, the lower cost of living in Seattle discouraged residence in Alaska. Wages are generally higher in Alaska because the cost of living is higher in Alaska. For example, the state initially established wages for many, if not all, of its nonunion employees by developing a wage schedule comparable to that of the states of Washington, Oregon, and California for similar

¹The salary of nonunion state workers is set by statute that provides a pay differential depending upon the worker's residence. Alaska Statute 39.27.020 sets a six step pay decrease for nonresident state workers that amounts to about a 22.5 percent pay reduction.

work, and adding 25 percent to offset the higher cost of living in Alaska. The cost of living in Alaska cities is substantially higher, for example, than in the Seattle-Everett area.² While nonresident workers' pay is not equal to the pay of Alaska resident workers, the pay is apparently competitive where they do reside. Without the pay differential, a Seattle-based employee would be rewarded a premium for nonresidence.

A combination of the Seattle change of port, the great distance from Alaska to Seattle, the location of the IOMM&P and MEBA union locals in Seattle, and the lower cost of living in that area all worked to the advantage of residents of the Seattle area and to the disadvantage of Alaska residents. The amendment to Alaska Statute 23.40.210 was designed to remove the disincentives to Alaska residence.

The amendment affected only members of the maritime unions employed by the state, that is, the Alaska Marine Highway System employees. One of those unions and the nonresident members of another have brought this action.

Thus, the statute does not have broad application. It was designed to remedy a problem uniquely Alaskan that affects only Alaska state employees. The decision below will affect few others beyond the actual litigants in the case. The questions presented in the case are not suffi-

²The petitioners have not argued that the 18-22 percent disparity in the wages between resident and nonresident Alaska Marine Highway System employees exceeds the difference in the cost of living between Alaska ports and Seattle, the home of most nonresident state Marine Highway System employees.

ently universal or important to warrant this Court's attention.

II. The only conflict with other circuit court decisions is unimportant.

Petitioners argue that the Ninth Circuit's holding under the commerce clause conflicts with decisions in the Third and Sixth Circuits. The Ninth Circuit held below that the dormant commerce clause does not create individual rights and that the district court lacked jurisdiction to consider petitioners' claim under that clause. The Ninth Circuit cited its previous decision in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 849 (9th Cir. 1985), *cert. denied*, — U.S. —, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987).

That case compared the commerce clause to the supremacy clause, noting that both clauses limit the power of the state to interfere in matters of national concern, and held that the commerce clause, like the supremacy clause, did not secure rights within the meaning of 42 U.S.C. Sec. 1983 and did not support an action under that section. The Ninth Circuit in *White Mountain Apache Tribe* examined and relied upon a line of authority culminating in the Eighth Circuit decision of *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F.2d 1139, 1144 (8th Cir. 1984), *cert. denied*, 469 U.S. 834, 105 S.Ct. 126, 83 L.Ed.2d 68 (1984), which found that the commerce clause did not create individual rights. The Ninth Circuit noted that other jurisdictions had found the dormant section of the commerce clause created individual rights but found their analysis unpersuasive.

The Ninth Circuit's position is completely consistent with its prior decisions and those of the Eighth Circuit, which this court has previously declined to review.

III. The Ninth Circuit correctly decided the issues below.

A. Commerce Clause

An alternate ground supports the Ninth Circuit's holding on the commerce clause. Even if the petitioners could invoke the commerce clause in support of their challenge to AS 23.40.210, the petitioners should not prevail under that clause.

The state is the employer of the Alaska Marine Highway System employees who brought this action. The commerce clause does not prohibit all interference with interstate commerce. It recognizes a market participant exception. The commerce clause permits state action as a market participant that might be impermissible under the clause if the state were acting in its sovereign capacity as a market regulator. In *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), this Court found it permissible under the clause for the City of Boston to require contractors on city construction projects to hire only Boston residents for at least half of the jobs. The basis for the decision was the market participant exception to the clause.

The instant case provides an even stronger case for this exception. The ordinance in *White* had the effect of regulating the hiring practices of private employers, although limited to city funded construction projects. In contrast, the pay differential affects only employees of the state or of its political subdivisions. The provision has no downstream or regulatory effects.

Petitioners cite *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7th Cir. 1986), to the contrary. Petition, p. 15. The statute reviewed in that case was an Illinois hiring preference for state residents on public funded construction projects. The case is distinguishable because the employment relationship was not between workers and the state but rather between workers and construction contractors under contract with the state and its political subdivisions. The Illinois statute did have some downstream effect. However, respondents also question the Seventh Circuit's conclusion that imposing conditions on political subdivisions is "regulating" because political subdivisions are mere subdivisions of the state and have no authority independent of it.

Nothing in the record supports any downstream or regulatory impacts in this case. The pay differential in AS 23.40.210, therefore, presents a stronger case for the market participant exception to the commerce clause than the ordinance reviewed in *White* and is constitutional under that decision.

B. Privileges and Immunities Clause

The Ninth Circuit rejected petitioners' privileges and immunities clause challenge on the basis that a pay differential did not discourage or prevent the petitioners from pursuing employment with the state on the Alaska Marine Highway System. It also found that a statute designed to provide pay equity did not undermine the principles embodied in the clause. Because the statute did not interfere with interstate relations or the freedom to seek and obtain work in Alaska, the clause was not implicated. The Ninth Circuit relied primarily on analysis in *United*

Building and Construction Trades Council of Camden v. Camden, 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984).

Several alternate grounds exist for the holding under the privileges and immunities clause. This Court has never found, for example, that the interest in public employment is a fundamental one entitled to protection under the clause. This case can be distinguished from the cases cited by petitioners concerning private employment, which has been labeled a fundamental privilege protected under the clause. If, however, the Court were to find that public employment is a fundamental interest entitled to protection under the clause, the Court would still need to examine whether the statute was valid as a justifiable discrimination against that interest. *Camden*, 465 U.S. at 222, 104 S.Ct. at 1029 (privileges and immunities clause “does not preclude discrimination against citizens of other States where there is a ‘substantial reason’ for the difference in treatment”). Because the pay differential promotes important state concerns and is substantially related to those concerns, the discrimination, if any exists, is justified. *Id.*

C. Right to Travel

One of the individual petitioners claims that his right to migrate has been deterred by the pay differential. The Ninth Circuit rejected this claim because the interest in public employment is not a fundamental right or an essential benefit. As such, intensive scrutiny is not required and the statute need only be rationally related to its goal of attracting Alaska residents to work for the

Alaska Marine Highway System. The Ninth Circuit concluded that it was. Petitioners do not, however, suggest a basis for arguing that fundamental rights or essential benefits are at issue and a higher level of scrutiny is appropriate. They also do not argue that the statute is not reasonably related to its goals. The decision below is completely consistent with this Court's precedent under the right to travel and petitioners do not even suggest otherwise.

CONCLUSION

The statute challenged by petitioners corrects a problem caused by Alaska's unique geography and conditions. It removes a disincentive to living in Alaska by compensating for the disparity in the cost of living between Alaska-based and outside-based employees of the Alaska Marine Highway System. It does not operate as an economic barrier to work in Alaska nor does it penalize migration or travel. The statute does not interfere with any of the rights embodied in the privileges and immunities clause, the commerce clause, and the right to travel. The decision of the Ninth Circuit correctly decided these issues, consistent with case precedent. Moreover, the impact of the decision does not extend beyond the parties before the Court. The matter therefore is not sufficiently universal or important to justify this Court's consideration.

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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